

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRANDON C. IKARD
Claimant

VS.

WICHITA WILD INDOOR FOOTBALL
Respondent

AND

TRAVELERS INDEMNITY COMPANY
Insurance Carrier

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Docket No. 1,047,656

ORDER

Respondent appeals the November 25, 2009, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was found to be an employee of respondent on the date of his accident and awarded medical treatment with Dr. Prince Chan as the designated authorized treating physician. Claimant was also awarded outstanding medical expenses incurred to date as authorized medical expenses and additional medical and future medical expenses as later presented.

Claimant appeared by his attorney, David H. Farris of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Sylvia B. Penner of Wichita, Kansas.

This Appeals Board (Board) Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held November 19, 2009, with attachments; and the documents filed of record in this matter.

ISSUE

Did the relationship of employer and employee exist on the date of claimant's accident? Respondent contends claimant was a volunteer and under no contract on the date of accident. Claimant contends the actions of respondent, its head coach and management rendered the relationship one of employer-employee.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Respondent is a semi-professional arena football team headquartered in Wichita, Kansas. Claimant, a college graduate, who has completed all the requirements for his master's degree, was competing for a position on respondent's team. Claimant traveled from his home in North Carolina to Wichita to try out for the team in March 2009. The two-week tryout was not successful for claimant, and he was released. When claimant came to the tryout, he was asked to sign a contract.¹ When claimant was released, the contract was to be terminated as noted on the Exit Examination Waiver.²

Shortly after being released and returning to North Carolina, claimant contacted Kenneth J. Matous, respondent's head coach, regarding a possible return to the team as a practice member. Claimant was allowed to return to the team on the practice squad and it was made clear that he was not a team roster member. When claimant was on the practice squad, he was required to sign a Release, Waiver Of Liability And Assumption Of Risk" (waiver) form each day before practice. These waiver forms were specific in noting that claimant was assuming all liability for any injuries suffered during these practices and required that claimant have health, accident and liability insurance on himself. The first waiver was signed on April 13, 2009, and the last was signed on June 23, 2009. Roster players were not required to sign the waiver form. Additionally, if a roster player missed practice or a game, they were disciplined or fined in some fashion. Claimant could miss practice without suffering any punishment or discipline.

When claimant returned to Wichita, he was told that he could stay in the team hotel with a team roster member, Lamont Reid, a friend of claimant's, for a night. But, thereafter, claimant was to be responsible for his own lodging. However, claimant remained as a roommate with Mr. Reid for the duration of his stay in Wichita. When Coach Matous discovered, in June 2009, that claimant was still staying with Mr. Reid in the team hotel, he took no action.

Claimant was allowed to participate in a food voucher program provided by respondent, but it is disputed between claimant and Coach Matous whether claimant was provided the same number of free meals as the roster players. Additionally, claimant

¹ P.H. Trans., Resp. Ex. 1.

² P.H. Trans., Resp. Ex. 1.

suffered two minor injuries while practicing with respondent: a tight IT band in one leg and a turf toe injury. Claimant was treated by respondent's trainers on both occasions. Claimant paid nothing for the treatment he received from these injuries. The trainers were employees of Kansas Joint & Spine, which had worked out an agreement with respondent for treatment of the players in exchange for advertising. This same services-for-advertising agreement also existed with the team hotel and the food companies providing the food vouchers. The medical treatment, food and hotel services were provided to the roster players as part of their remuneration for playing for respondent.

The players who suited up and played at games were also paid a cash stipend. Claimant was never paid any cash stipend during his time with respondent's team. Coach Matous was aware that claimant was treated by the trainers for the two minor injuries and that claimant was receiving the food vouchers. Coach Matous testified that he was unaware that claimant was staying at the team motel until sometime in June 2009. But, when he became aware of the situation, he took no action.

On July 14, 2009, claimant suffered a serious injury to his left arm during practice when he collided with a team member. Claimant broke his left arm and dislocated his left wrist. Claimant was taken to St. Francis Hospital by one of the trainers. There, he was initially seen by Dr. Livermore, the team doctor. He was later referred to Dr. Prince Chan for treatment of the arm and wrist injuries. On the date of the accident, claimant had not been asked to sign a waiver form. As noted above, claimant last signed a waiver form on June 23, 2009. Coach Matous attributed this to negligence on his part. No other explanation is contained in this record.

Claimant testified that he had conversations with Coach Matous about being placed on the roster in the event a roster player left the team. Coach Matous acknowledged that this was the dream of every practice player. However, Coach Matous denied any guarantees to claimant about the roster. Claimant testified that when the team no longer required that he sign the waiver form, he assumed that he had been placed on the roster. He never asked the coach about his name on the roster, and he never bothered to check the list himself. Respondent's exhibit 2 to the preliminary hearing contains the roster lists from April 4, 2009, through July 2, 2009. Claimant's name does not appear on any of the rosters in respondent's exhibit 2. Claimant also testified that he thought the contract he initially signed in March during tryouts was the contract that would be forwarded to the league when he was placed on the roster. This allegation was denied by Coach Matous. He stated that the original contract had been terminated when claimant failed to make the team at the original tryouts. No new contract was ever entered into between claimant and respondent.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

Respondent argues that no employer-employee relationship existed between claimant and respondent. Any contract created at the time of the initial tryout had been terminated at the end of claimant's failed tryout. Claimant's actions at practice with the team were on a voluntary basis only. Claimant never received a wage for the practices, never appeared on a team roster, never traveled or suited up for a game and never played for respondent. What claimant did was to sleep in a respondent-provided motel, both before and after respondent became aware of his arrangement, receive food vouchers the same as the roster players and receive treatment from respondent-provided trainers, and effective June 23, 2009, he was no longer required to sign the waiver form. It appears that claimant was receiving mixed signals from respondent.

There must be at least two parties to a contract. It is not possible for an individual, simply by his own mental operations, to enter into a contract with himself, or with himself and others, even though he acts in different capacities.⁶

Operation of the Workmen's Compensation Act is founded upon the existence of a contractual relationship of employer and employee. To trigger operation of the Act, there must be a contract between two persons that creates between them the relationship of employer and employee. The rights and liabilities fixed by the Act

³ K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 2009 Supp. 44-501(a).

⁶ *Kumberg v. Kumberg*, 232 Kan. 692, 659 P.2d 823 (1983); *Sinclair Refining Co. v. Long*, 139 Kan. 632, Syl. ¶ 2, 32 P.2d 464 (1934).

grow out of that contract, a contract which by incorporation embodies the terms and provisions of the Act.⁷

If this situation was merely claimant's own delusions leading him astray, a contract would not exist. But, as noted above, claimant was being sent mixed signals from respondent. Claimant was told he was not on the roster and was required to sign a waiver every day. The end of the waivers signaled membership on the team roster. Claimant was provided a place to live, without objection, food vouchers just as the roster players and medical treatment from respondent's provided trainers, and, as of June 23, 2009, claimant no longer was required to sign the waiver form. Additionally, after the injury, claimant was advised by Jeremy Langer, respondent's new trainer, to file this matter as a workers compensation claim. Coach Matous testified that the waivers were for the protection of respondent, to "cover us" for insurance purposes.⁸ Yet, he failed, for three full weeks, to require that claimant sign a waiver. He also acknowledged that roster players were not required to sign waivers, only practice players. K.S.A. 2009 Supp. 44-508(b) states that:

'Workman' or "employee" or "worker" means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer.

The statute goes on to include professional athletes in the list of recognized workers, employees and workmen.

This Board Member finds the actions of respondent point to an employer-employee relationship in this instance. While there are indications that claimant was merely a volunteer under K.S.A. 2009 Supp. 44-508(b) and no election had been filed by respondent, the persuasive evidence supports a finding that claimant was an employee under contract with respondent. Therefore, the award of benefits by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

⁷ *Allen v. Mills*, 11 Kan. App. 2d 415, 724 P.2d 143 (1986).

⁸ P.H. Trans. at 82 & 93.

⁹ K.S.A. 44-534a.

CONCLUSIONS

Claimant has satisfied his burden of proving that there existed an employment contract between him and respondent and the injuries suffered on July 14, 2009, arose out of and in the course of that relationship. The award of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated November 25, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March, 2010.

HONORABLE GARY M. KORTE

c: David H. Farris, Attorney for Claimant
Sylvia B. Penner, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge